

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GENGHIS KHAN ALI STEVENSON,
CDCR # P-46050

Plaintiff,

RYAN THOMAS HARMON, Correctional
Officer; JOHN DOE,

Defendants.

Civil No. 10cv2663 JLS (JMA)

ORDER:

- (1) GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS*, IMPOSING NO INITIAL PARTIAL FILING FEE AND GARNISHING \$350.00 BALANCE FROM PRISONER TRUST ACCOUNT [Doc. No. 2];**
- (2) DENYING MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 3] AND**
- (3) DISMISSING ACTION FOR SEEKING MONETARY DAMAGES AGAINST DEFENDANTS WHO ARE IMMUNE PURSUANT TO 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)**

Plaintiff, a state inmate currently incarcerated at Kern Valley State Prison located in Delano, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion for Appointment of Counsel [Doc. No. 3]

I.

MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 3]

Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

14 The Court denies Plaintiff's request without prejudice, as neither the interests of justice
15 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
16 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

II.

MOTION TO PROCEED IFP

19 All parties instituting any civil action, suit or proceeding in a district court of the United
20 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
21 U.S.C. § 1914(a). An action may proceed despite a party's failure to pay only if the party is
22 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493
23 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
24 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in
25 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28
26 U.S.C. § 1915(b)(1) & (2).

27 | //

28 | //

1 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
2 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement
3 shows that he has insufficient funds from which to pay an initial partial filing fee.

4 Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 2] and
5 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further
6 orders the Secretary of the California Department of Corrections and Rehabilitation ("CDCR")
7 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them
8 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
9 § 1915(b)(1).

III.

SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

The Prison Litigation Reform Act (“PLRA”)’s amendments to 28 U.S.C. § 1915 also obligate the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir. 2000) (§ 1915A).

23 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
24 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28
25 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner's suit
26 make and rule on its own motion to dismiss before directing that the Complaint be served by the
27 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 ("[S]ection 1915(e) not only permits,
28 but requires a district court to dismiss an in forma pauperis complaint that fails to state a

1 claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 2 § 1915A).

3 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 4 allegations of material fact and must construe those facts in the light most favorable to the
 5 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 6 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). Here, however, even
 7 presuming Plaintiff’s factual allegations true, the Court finds his Complaint both fails to state
 8 a claim upon which relief can be granted and seeks monetary relief from defendants who are
 9 immune. See 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213
 10 F.3d at 446, n.1.

11 In Plaintiff’s Complaint, he seeks to hold Defendant Harmon liable for “malicious
 12 prosecution” arising from a criminal proceeding in Imperial County Superior Court wherein
 13 Plaintiff was indicted for “battery on a non-confined person by prisoner.” (Compl. at 6.)
 14 Plaintiff was charged with this crime by he later received a dismissal of all the charges. (*Id.*)
 15 Plaintiff also alleges that he brought a civil action against Defendant Harmon for the incident
 16 that gave rise to the criminal charges. (*Id.*) Plaintiff alleges that Defendant Harmon perjured
 17 himself while giving grand jury testimony and fabricated reports with regard to the alleged
 18 incident. (*Id.* at 4-6.)

19 First, to the extent that Plaintiff seeks monetary damages from Defendant Harmon, a
 20 witness during his criminal trial, for allegedly committing perjury, Defendant Harmon is
 21 absolutely immune. *See* 28 U.S.C. § 1915(e)(2)(b)(iii); § 1915A(b)(2). “Witnesses, including
 22 police witnesses, are immune from liability for their testimony in earlier proceedings even if they
 23 committed perjury.” *Paine v. City of Lompoc*, 965 F.3d 975, 981 (9th Cir. 2001) (citing *Briscoe*
 24 v. *LaHue*, 460 U.S. 325, 345 (1983)). “Witness immunity also extends to conspiracies to commit
 25 perjury.” *Id.* (citing *Franklin v. Terr*, 201 F.3d 1098, 1101-02 (9th Cir. 2000). *See also Burns*
 26 v. *County of King*, 883 F.2d 819, 821 (9th Cir. 1989) (witnesses are absolutely immune from
 27 suits for damages under 42 U.S.C. § 1983 for testimony given at trial, or for testimony given
 28 during adversarial pretrial proceedings); *Demoran v. Witt*, 781 F.2d 155, 157-58 (9th Cir. 1986).

1 Thus, the claims against Defendant Harmon must be dismissed for seeking monetary
 2 damages against an immune Defendant.

3 Accordingly, the Court finds that Plaintiff's entire Complaint must be dismissed for
 4 seeking monetary damages against immune defendants pursuant to 28 U.S.C. §§ 1915(e)(2)(B)
 5 and 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1. If Plaintiff
 6 chooses to file an Amended Complaint, he is cautioned that he may not re-allege any claims that
 7 arose in *Stevenson v. Harmon, et al.*, S.D. Cal. Civil Case No. 07cv0277 W (PCL). This Court
 8 takes judicial notice that Defendant Harmon's Motion for Summary Judgment as to Plaintiff's
 9 excessive force claims was granted in that matter and the Court's ruling was later affirmed by
 10 the Ninth Circuit Court of Appeals.

11 **IV.**

12 **CONCLUSION AND ORDER**

13 Good cause appearing, **IT IS HEREBY ORDERED:**

- 14 1. Plaintiff's Motion to Appoint Counsel is **DENIED** [Doc. No. 3].
 15 2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is

16 **GRANTED.**

17 3. The Secretary of California Department of Corrections and Rehabilitation, or his
 18 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
 19 owed in this case by collecting monthly payments from the account in an amount equal to twenty
 20 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
 21 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
 22 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
 23 **ASSIGNED TO THIS ACTION.**

24 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
 25 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
 26 Sacramento, California 95814.

27 ///

28 ///

1 **IT IS FURTHER ORDERED** that:

2 5. Plaintiff's Complaint is **DISMISSED** for seeking monetary damages against
3 immune defendants. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). However, Plaintiff is
4 **GRANTED** forty five (45) days leave from the date this Order is "Filed" in which to file a First
5 Amended Complaint which cures all the deficiencies of pleading noted above. Plaintiff's
6 Amended Complaint must be complete in itself without reference to the superseded pleading.
7 *See* S.D.CAL.CivLR. 15.1. Defendants not named and all claims not re-alleged in the Amended
8 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.
9 1987).

10 Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief
11 may be granted, it may be dismissed without further leave to amend and may hereafter be
12 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79
13 (9th Cir. 1996).

14 **IT IS SO ORDERED.**

15
16 DATED: February 23, 2011

17 
18 Honorable Janis L. Sammartino
19 United States District Judge
20
21
22
23
24
25
26
27
28